Supreme Court, U.S.
FILED

94 570 SEP 28 1994

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHIGAN BELL TELEPHONE COMPANY, PETITIONER,

v.

DEPARTMENT OF TREASURY AND STATE BOARD OF ASSESSORS, RESPONDENTS

On Petition for a Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits state tax authorities from discriminating between railroads and other public service company taxpayers by imposing a greater tax burden on the latter, when railroads and other public service companies are included in the same tax classification by the state legislature.

This question is also presented by the petition for certiorari in *ANR Pipeline* v. *Director of Property Valuation*, No. 93-1995 (filed June 13, 1994).

RULE 29.1 STATEMENT

Petitioner Michigan Bell Telephone Company is known as Ameritech Michigan. Its parent company is Ameritech Corporation. Ameritech Services, Inc., is a non-wholly owned subsidiary of Ameritech Michigan.

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PETITION FOR A WRIT OF CERTIORARI

Michigan Bell Telephone Company respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (App., *infra*, 1a-17a) is reported at 445 Mich. 470, 518 N.W.2d 808. The opinion of the Michigan Court of Appeals (App., *infra*, 19a-20a) is unreported. The opinion of the Michigan Tax Tribunal is reported at 1990 Mich. Tax LEXIS 24.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on June 21, 1994. A timely petition for rehearing was denied on August 2, 1994. App., *infra*, 18a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503, Michigan Act 282, Mich. Comp. Laws Ann. § 207.4, and the Michigan Intangibles Tax Act, Mich. Comp. Laws Ann. § 205.132(e), are set out at App., *infra*, 22a-23a.

STATEMENT

By Michigan statute, petitioner Michigan Bell Telephone Company ("Michigan Bell") and other telephone companies are classified for state property tax assessment purposes together with railroad companies. Rather than treating railroad and telephone companies alike, however, Michigan tax authorities have discriminated against telephone companies. As required by the federal Railroad Revitalization and Regulatory Reform Act, the intangible assets of railroad companies are exempt from taxation. Yet despite the Michigan legislature's determination to classify railroads and telephone companies in a single category, state tax authorities have assessed the intangible property of telephone companies. The Michigan Supreme Court ruled that the tax authorities' action was valid. As a result, Michigan Bell's property tax base for each of the tax years in issue has been assessed at well over a billion dollars—an amount vastly in excess of the value of its tangible property.

This discrimination between railroad companies and other taxpayers included in the same classification under state law is indistinguishable from the practice that the Nebraska Supreme Court held to violate the federal Equal Protection Clause in *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). This Court should grant certiorari to settle this conflict on an important and recurring issue—one that is also presented in the taxpayers' petition for certiorari in *ANR Pipeline Co.* v. *Director of Property Valuation*, No. 93-1995.

1. The Michigan Tax Scheme and the 4-R Act

Michigan Act 282 imposes "a selective tax * * * upon a relatively small number of companies whose property is centrally assessed, and whose businesses are public service in nature." App., *infra*, 12a. It applies to "railroad companies, union station and depot companies, telegraph companies, telephone companies" and various railroad rolling stock companies. The statute includes these businesses within the same classification for purposes of assessing their property for taxation. Act 282, Mich. Comp. Laws Ann. § 207.4, App., *infra*, 22a; see *Citizens' Telephone Co.* v. *Fuller*, 229 U.S. 322, 325 (1913). Respondent State Board of Assessors ("the Board") annually assesses the property of taxpayers covered by Act 282 at 50 per cent of its cash value. Ad valorem taxes on that assessed value are then calculated based upon an average rate of the taxes imposed on other taxpayers. Mich. Comp. Laws Ann. § 207.13; see App., *infra*, 4a-5a.

Section 306(1)(d) of the federal Railroad Revitalization and Regulatory Reform Act ("the 4-R Act") prohibits a state from imposing a tax that discriminates against rail carriers. 49 U.S.C. § 11503(b)(4), App., *infra*, 22a. Under the 4-R Act, therefore, the intangible assets of railroads may not be included in the Board's assessment of the value of railroads' property upon which ad valorem taxes are to be levied. To do so would discriminate against railroads compared to the vast majority of Michigan taxpayers that are subject to ad valorem tax only on their tangible property pursuant to the General Property Tax Act. Mich. Comp. Laws Ann. § 211.1 *et seq.*, App. *infra*, 4a; see also Mich. Constitution of 1963, Art. 9, § 3, App., *infra*, 14a n.18.

Despite the fact that Michigan's Act 282 classifies railroads and telephone companies together for purposes of assessing the value of their property subject to taxation, and despite the fact that the intangible personal property of railroads must be excluded from assessment, the Board nevertheless *included* the intangible personal property of petitioner Michigan Bell when it assessed the value of petitioner's property for the tax years 1984, 1985, and 1986. The Board thus assessed the value of Michigan Bell's intangible personal property, while it was required to assess railroads solely on the basis of their tangible assets. Respondent Michigan

Department of Treasury levied taxes against Michigan Bell for the tax years in question on the basis of that discriminatory assessment. App., *infra*, 3a-5a.

2. The Decisions of the Tax Tribunal and Michigan Court of Appeals

Michigan Bell challenged its Act 282 taxes for 1984 through 1986 and the assessment on which they were based in the Michigan Tax Tribunal. That Tribunal is a "quasi-judicial agency" of limited jurisdiction. *Wikman* v. *Novi*, 413 Mich. 617, 629, 322 N.W.2d 103, 106 (1982). While it has exclusive jurisdiction over challenges to assessments under state property tax laws, it has no power to determine constitutional issues. *Id.* at 646-647, 322 N.W.2d at 114 ("Generally speaking, an agency exercising quasi-judicial power does not undertake the determination of constitutional questions or possess the power to hold statutes unconstitutional"); see also *Dation* v. *Ford Motor Co.*, 314 Mich. 152, 22 N.W.2d 252 (1946) (Michigan Workers' Compensation Board does not determine constitutional questions). Nevertheless, despite this bar, Michigan Bell attempted to raise its equal protection argument before the Tax Tribunal. See Michigan Bell's Trial Brief Relating to Valuation at 37-39, in *Michigan Bell Telephone Co.* v. *Department of Treasury*, No. 90553 (Mich. Tax Trib.). Michigan Bell also argued that the Board's inclusion of intangible property in its assessment was not authorized by Act 282 or the Intangibles Tax Act. The Tax Tribunal did not address Michigan Bell's federal equal protection argument, and it rejected petitioner's state law challenge to this aspect of the assessment of its property.

On appeal to the Michigan Court of Appeals, Michigan Bell again argued that the Board of Assessor's discriminatory treatment of the intangible property of railroads and of telephone companies violated the Equal Protection Clause. See Brief of Appellant Michigan Bell Telephone Co. at 21-22, in *Michigan Bell Telephone Co.* v. *Department of Treasury*, Nos. 127402 & 133117 (Mich. Ct. App.). Michigan Bell thereafter moved the Court of Appeals for leave to file a supplemental brief presenting recent authority (the Nebraska Supreme Court's ruling in *Northern Natural Gas*) supporting its federal constitutional argument. Over the state's objection that Michigan Bell had waived its equal protection

argument by not raising it in the Tax Tribunal, the court granted Michigan Bell's motion and accepted its supplemental brief for filing. In that brief, Michigan Bell argued that "Michigan Bell has been taxed on its intangible property while the intangible property of * * * railroad companie[s] in the same class are exempt from such taxation," and that this "scheme of taxation constitutes discrimination against Michigan Bell in violation of the equal protection clauses of the United States and Michigan Constitutions." Supplemental Brief of Appellant Michigan Bell Telephone Co. at 1, in *Michigan Bell Telephone Co.*, *supra*.

In a one-page order (App., *infra*, 20a-21a), the Court of Appeals affirmed the decision of the Tax Tribunal, adopting the Tribunal's opinion as its own. The court did not mention Michigan Bell's equal protection claim.

3. The Michigan Supreme Court's Decision

Michigan Bell filed an application for leave to appeal to the Michigan Supreme Court, contending, *inter alia*, that the discriminatory state tax violated federal equal protection standards. The Michigan Supreme Court granted Michigan Bell leave to appeal limited to the question "whether the tax provided for under [Act 282] permits the valuation of intangible personal property for assessment and taxation purposes." App., *infra*, 3a. Michigan Bell set forth in its brief to the Supreme Court a four page argument entitled "The [Tax] Tribunal's Interpretation of Act 282 Violates the Equal Protection Provisions of the Federal and Michigan Constitutions." Brief for Appellant at 20-24, in *Michigan Bell Telephone Co.* v. *Department of Treasury*, No. 95347-49 (Mich.). Michigan Bell once again argued that "[b]ecause railroad companies are taxable under Act 282, but have no obligation to pay any Act 282 taxation on their intangible property, taxation of Michigan Bell's intangible property would clearly constitute unconstitutionally disparate treatment." *Id.* at 21. In its decision, the Supreme Court acknowledged that Michigan Bell had raised this argument, but declined to address it on the ground that "this issue clearly falls outside the limits of our order granting leave to appeal." App., *infra*, 17a n.22. The Supreme Court subsequently denied Michigan Bell's motion for rehearing. App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

Even though the Michigan legislature has included railroad and telephone companies in exactly the same tax classification, Michigan tax authorities have imposed many millions of dollars in taxes on the intangible assets of telephone companies while the intangible assets of railroad companies are wholly exempt from taxation under the 4-R Act. This discriminatory treatment of similarly situated public service companies is in direct conflict with a ruling of the Nebraska Supreme Court that such disparities violate the Equal Protection Clause, and it cannot be reconciled with this Court's equal protection jurisprudence. This Court should grant certiorari in this case to resolve this conflict on a frequently recurring issue of great economic importance. In the alternative, if this Court grants certiorari in *ANR Pipeline Co.* v. *Director of Property Valuation*, No. 93-1995—a case that presents the same equal protection question—it should hold Michigan Bell's petition pending the resolution of the *ANR* case on the merits.

I. MICHIGAN'S DISPARATE TREATMENT OF PUBLIC SERVICE COMPANIES WITHIN THE SAME TAX CLASSIFICATION DENIES EQUAL PROTECTION AND CONFLICTS WITH A DECISION OF THE NEBRASKA SUPREME COURT

This Court has held that "'States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985). They may adopt a tax classification that "rationally furthers a legitimate state interest" and is not "arbitrary or irrational." *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992). Once a state has exercised its power to draw rational lines to establish a tax classification, however, it may not then discriminate between taxpayers within that classification by engaging in the intentional systematic undervaluation or overvaluation of the property of only some taxpayers. *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345 (1989). See *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946) ("The equal protection clause * * * protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class"); *Sunday Lake Iron Co.* v.

Township of Wakefield, 247 U.S. 350, 352-353 (1918) ("[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property"); see also *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923) (a tax authority that discounted assessments of some property within a single class would violate the equal protection rights of taxpayers who were not afforded this benefit).*

In *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 232 Neb. 806, 815-816, 443 N.W.2d 249, 256 (Neb. 1989), the Nebraska Supreme Court applied this Court's equal protection decisions to hold that state tax authorities could not constitutionally collect personal property taxes from pipeline companies when they had been enjoined under the 4-R Act from collecting those same taxes from railroad and car companies. The Nebraska Constitution provided that the tangible property of railroads and pipelines be taxed on a uniform basis. *Id.* at 815, 443 N.W. 2d at 255-256. In this context, the Nebraska Supreme Court held that "it makes no difference [for equal protection purposes] if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by [state tax authorities], legislative enactment, or the final and binding judgment of the federal courts." *Id.* at 816, 443 N.W. 2d at 256. Because state law classified railroad and car companies and pipeline companies alike, "[t]he state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, * * * has denied [pipelines] equal protection of the law." *Id.* at 815, 443 N.W.2d at 256.

The decision in *Northern Natural Gas* that a state must be consistent in its treatment of taxpayers who fall within the same state tax classification is squarely at odds with Michigan's discriminatory treatment of taxpayers covered by Act 282. Act 282 places railroads and telephone companies in the same class for

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* This well-established equal protection requirement is more fully discussed in the petition for certiorari in *ANR Pipeline Co.* v. *Director of Property Valuation*, No. 93-1995, at pages 10-12.

purposes of assessing property taxes. According to *Northern Natural Gas*, the federal Constitution's Equal Protection Clause thus requires that Michigan tax authorities treat railroads and telephone companies the same way. Although the intangible property of railroads is not subject to tax, Michigan's State Board of Assessors has taxed the intangible property of telephone companies. Under *Northern Natural Gas* this case plainly would have been decided in Michigan Bell's favor.

It is a recurring question whether the non-discriminatory tax treatment accorded to railroads as a result of states' compliance with the 4-R Act triggers an equal protection requirement that states afford similar treatment to other taxpayers within the same tax classification as railroads. Courts in three states have disagreed with the Nebraska Supreme Court's analysis in *Northern Natural Gas*, finding no equal protection violation in similar circumstances. *ANR Pipeline Co.* v. *Director of Property Valuation*, 254 Kan. 534, 866 P.2d 1060 (Kan. 1994), cert. petition pending, No. 93-1995; *Federal Express Corp.* v. *Tennessee State Board of Equalization*, 717 S.W.2d 873, 876 (Tenn. 1986); *Alabama* v. *Colonial Pipeline Co.*, 471 So. 2d 408, 412-413 (Ala. Civ. App. 1984). This issue also arises under the taxation schemes of numerous other states and will be the subject of continuing litigation absent this Court's intervention. *E.g.*, Wis. Stat. Ann. § 76.01 *et seq.* (1993) (railroads and other public service companies are classified together; Wisconsin tax authorities have nonetheless preferentially discounted railroads' personal property by 80% in assessing their value for tax purposes); Iowa Code Ann. § 427A.1 (1993) (same); La. Rev. Stat. Ann. § 47:1851(M) (1993) (public service properties, including railroads, fall within a single tax classification; the Louisiana tax commission has nonetheless assessed railroads, but not other public service entities, at 15% of fair market value). This Court should grant certiorari to settle the confusion among the state courts on this constitutionally significant issue, which is of enormous economic importance to taxpayers and state treasuries throughout the country.

II. MICHIGAN'S DISCRIMINATORY TREATMENT OF COMPANIES WITHIN THE SAME TAX CLASSIFICATION CANNOT BE JUSTIFIED ON FEDERAL PREEMPTION GROUNDS

Act 282 establishes an ad valorem property taxation scheme classifying railroads and telephone companies together. Consistent with equal protection, Michigan tax authorities may not tax telephone companies' intangible property while at the same time the intangible property of railroads is exempt from taxation. *E.g.*, *Allegheny Pittsburgh Coal*, 488 U.S. at 345.

Michigan's discriminatory tax regime receives no support from the federal 4-R Act. The 4-R Act requires only that railroad property be assessed and taxed at rates that are no higher than those applied to commercial and industrial property. 49 U.S.C. § 11503(b), App., *infra*, 22a. The Act in no way interferes, however, with the Michigan tax classification in Act 282, which triggers the state's equal protection obligation to treat petitioner Michigan Bell in the same way as railroads. The 4-R Act leaves states free to classify taxpayers in any rationally justifiable way, but does not diminish their constitutional obligation to accord equal treatment to taxpayers within a single tax classification.

Although the 4-R Act mandates non-discriminatory tax treatment of railroads, this Court's precedents make clear that it has no larger preemptive effect on a state's tax classifications. In the absence of explicit statutory language marking out the preemptive effect of a federal law, a state tax scheme is preempted only "where Congress has legislated comprehensively to occupy an entire field of regulation" or "where the state law at issue conflicts with federal law, either because it is impossible to comply with both * * * or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509 (1989). These standards are to be applied stringently in the case of the 4-R Act because it impinges on the state's traditional powers of taxation. See *Department of Revenue* v. *ACF Industries, Inc.*, 114 S. Ct. 843, 850-851 (1994).

Applying these principles, the 4-R Act clearly does not preempt the Michigan legislature's determination in Act 282 that railroads and telephone companies should be subjected to like property taxes. The 4-R Act does not occupy the field of state taxation, imposing only a narrow non-discrimination requirement relating to the taxation of railroads. Nor would Michigan's taxation of telephone companies on the same basis as railroads (as well as virtually every other property tax payer in Michigan) interfere in the least with Congress' goal of ensuring that railroads are not subject to a greater tax burden than other businesses. Michigan could readily comply with its 4-R Act obligations and treat telephone companies and railroads equally. See *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 290-292 (1987).

Michigan thus has violated Michigan Bell's equal protection rights by discriminatorily imposing a property tax on the intangible assets of telephone companies while federal law exempts railroads falling within the same state law classification from any tax on their intangibles. By taxing telephone companies' intangibles, Michigan authorities have acted in direct conflict with the Nebraska Supreme Court's decision in *Northern Natural Gas*, which recognized that discrimination of precisely the sort at issue in this case is unconstitutional. This Court should grant certiorari to overturn Michigan's unconstitutional imposition of a substantial and discriminatory tax and to settle a direct conflict on a frequently recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending its disposition of *ANR Pipeline Co.* v. *Director of Property Valuation*, No. 93-1995.

Respectfully submitted.

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SEPTEMBER 1994

APPENDICES

APPENDIX A
MICHIGAN SUPREME COURT

Nos. 95347-95349

MICHIGAN BELL TELEPHONE COMPANY,
Petitioner-Appellant,
v.
DEPARTMENT OF TREASURY,
Respondent-Appellee.

Before: THE ENTIRE BENCH

(Opinion Filed June 21, 1994)

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* * *

Griffin, J.:

This appeal requires us to determine whether intangible personal property of the petitioner, Michigan Bell Telephone Company (MBTC), was properly considered in the valuation and assessment of its property subject to taxation under 1905 PA 282, MCL 207.1 *et seq.*; MSA 7.251 *et seq.* Because we conclude that intangibles were appropriately taken into account for purposes of assessing and taxing petitioner's property under Act 282, we affirm the decisions of the Michigan Tax Tribunal and the Court of Appeals.

I

Act 282 requires an annual assessment by the State Board of Assessors of the property of certain public service businesses, including telephone companies, and the levy each year of taxes

thereon.[1] At issue in this case is the value determination of property in Michigan owned by petitioner as an operating telephone system and the extent to which it is taxable under Act 282 for the tax years 1984, 1985, and 1986.[2]

Challenging the board's assessments for those years, petitioner appealed to the Tax Tribunal.[3] After hearing twenty days of testimony, including each party's expert appraisal witnesses, the tribunal issued an opinion and judgment that culminated in

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[1] The title of Act 282 reads:

> An act to provide for the assessment of the property, by whomsoever owned, operated or conducted, of railroad companies, union station and depot companies, telegraph companies, *telephone companies*, sleeping car companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight companies and all other companies owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this state, and for the levy of taxes thereon by a state board of assessors, and for the collection of such taxes, and to repeal all acts or parts of acts contravening any of the provisions of this act. [Emphasis added.]

[2] The tribunal noted that before January 1, 1984, MBTC was owned by American Telephone and Telegraph, that on that date, consistent with a federal consent decree requiring divestiture by AT&T of certain operating telephone companies, seven regional holding companies were established, one of which was American Information Technologies Corporation (Ameritech), and that MBTC became a wholly owned subsidiary of Ameritech.

[3] Petitioner claimed that the assessment of its property pursuant to Act 282 for each of the tax years 1984, 1985, and 1986 was in excess of fifty per cent of the property's true cash value. See Const 1963, art 9, §§ 3 and 5.

modifications of the assessments for the years in question.[4] In reaching its decision, the tribunal determined, in accord with what it described as the "generally accepted mode of valuation for utility property," that petitioner's property should be assessed as a "unit" to reflect its "going concern" value. (Docket No. 900553, March 13, 1990, p 4.)

The tribunal explained:

> The exemplification of the going concern concept is found in the telephone pole, which is of very little intrinsic worth without the franchise to operate it legally. The value of that franchise, in large part, brings value to that pole, not the pole itself; a so-called "synergy" occurs. It therefore follows that the franchise and other unquantifiable intangibles are essential and valuable components of certain real and personal tangible property (e.g., poles/wires) and, unless otherwise prohibited, must be included in the valuation of the tangible property. (Docket No. 900553, March 13, 1990, p 7.)

The tribunal concluded that its consideration of "the intangible elements of the going concern under the unit valuation method [is] consistent with the Michigan constitutional and statutory framework." *Id.*, p 13.

Petitioner appealed in the Court of Appeals and argued, inter alia, that the tribunal had improperly included intangible property in its valuations for the three years at issue. Adopting the opinion of the tribunal as its own, the Court of Appeals affirmed in an unpublished memorandum opinion, issued November 6, 1992 (Docket Nos. 127402, 131780, and 133117).

We then granted leave to appeal, "limited to whether the tax provided for under 1905 PA 282, MCL 207.1 *et seq.*; MSA 7.251 *et seq.*, permits the valuation of intangible personal property for assessment and taxation purposes." 443 Mich 884 (1993).

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[4] The 1984 assessment of $1,695,500,000 was reduced by $138,616,850; the 1985 assessment of $1,590,000,000 was reduced by $200,610,200; and the 1986 assessment of $1,650,000,000 was increased by $56,061,300. (Docket No. 900553, March 13, 1990, p 66.)

II

A brief history of Michigan's taxation of telephone companies was provided by the United States Supreme Court in *Citizens' Telephone Co of Grand Rapids* v *Fuller*, 229 US 322, 325; 33 S Ct 833; 57 L Ed 1206 (1913):

> Prior to 1909 telephone companies were taxed under Act No. 179 of the Public Acts of Michigan . . . at the rate of 3 % on their gross receipts for the year in which the tax was laid. . . . The taxes paid were in lieu of all other taxes.
>
> Act No. 282 of the Public Acts of 1905 . . . provided for the assessment of the property of railroads and certain other companies and for the levying of taxes thereon by a State Board of Assessors. The act did not include either telephone or telegraph companies.
>
> In 1909 the legislature passed Act No. 49 . . . , which amended the title and certain sections of the Act No. 282 and provided for the assessment by the State Board of Assessors of the property of telephone companies on an ad valorem basis instead of a tax on their gross earnings, as provided by the act of 1899.

As petitioner has correctly explained, most of the property in Michigan that is subject to ad valorem (i.e., value based) taxation is valued and taxed by local units of government pursuant to the General Property Tax Act, 1893 PA 206, MCL 211.1 *et seq.*; MSA 7.1 *et seq.* However, certain public service businesses, including railroad and telephone companies, which typically have property interests that extend through several taxing districts or states, are taxed separately under Act 282 "in lieu of all taxes for state and local purposes . . . ."[5]

Under this statutory arrangement, all of the property of a telephone company "used in carrying on [its] business"[6] is assessed each year—not by a local township supervisor or assessor,

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[5] Act 282, § 14.

[6] Act 282, § 10.

but rather—by a central authority, i.e., the State Board of Assessors.[7] Act 282 requires that such property be assessed at fifty percent of its true cash value, and taxed "at the average rate of taxes for state, county, township, school, municipal and other purposes levied through this state during the preceding year . . . ."[8]

Although petitioner challenges the amount of the assessment for each of the years in question, it does not dispute the tribunal's use in this case of the "capitalization of income" method of valuing its property.[9] Moreover, petitioner states that the valuation of its real and personal property as a "unit," reflecting its use as a "going concern," is "not at issue here." According to petitioner, the "sole issue" is the "incorporation of intangibles" in the determination of the value of its property for Act 282 purposes.

In support of its position that the tribunal improperly included intangible property, rather than valuing and taxing only the real and *tangible* personal property of the company, petitioner advances three arguments. It contends, first, that Act 282 does not authorize taxation of intangible personal property; second, that the intangibles tax act[10] exempts its intangibles from Act 282 taxation; and, finally, that taxation of its intangible property is unconstitutional in light of Const 1963, art 9, § 5.

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[7] Act 282, § 1 provides: "The board of state tax commissioners . . . together with the governor, shall ex officio, constitute a state board of assessors . . . ."

[8] Act 282, § 14.

[9] As this Court explained in *Antisdale* v. *City of Galesburg*, 420 Mich 265, 276; 362 NW2d 632 (1984), the "income" or "capitalization of income" approach is one of three basic techniques used in determining the true cash value of property that have been recognized by the Tax Tribunal and the courts. The other two are (1) the market approach, and (2) the cost-less-depreciation approach.

[10] 1939 PA 301, MCL 205.131 *et seq.*; MSA 7.556(1) *et seq.*

Before addressing each of these arguments, we take note of the applicable standard of appellate review. In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. *Continental Cablevision* v *Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988).

III

According to the petitioner, its "basic argument" is "that Act 282 does not authorize the taxation of intangible property . . . ."

Section 4 of Act 282 provides in pertinent part that the State Board of Assessors shall "make an annual assessment . . . of the *property* . . . [of] telephone companies . . . ." Thereafter, § 5 of the act provides in pertinent part:

> The term *property*, as used in this act, shall be deemed to include *all property*, real or personal, belonging to . . . companies . . . subject to taxation under this act, including . . . telephone poles, wires, conduits, switchboards, *and all other property* used in carrying on their business and owned by them respectively, and *all other real and personal property*, and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property . . . ." [Emphasis added.]

Petitioner argues for its interpretation of the act by pointing to a tenet of statutory construction recently restated by this Court in *Molter* v. *Dep't of Treasury*, 443 Mich 537, 543; 505 NW2d 244 (1993), i.e., the authority to impose a tax must be expressly authorized by law; it will not be inferred. Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer. *In re Dodge Brothers*, 241 Mich 665, 669; 217 NW 777 (1928).

When the case of *In re Brackett Estate*, 342 Mich 195, 204; 69 NW2d 164 (1955), came before this Court, we were required to consider the meaning of the word "property" within the context of

the inheritance tax act.[11] There, we determined that an employee's interest in a profit-sharing plan established by his employer fell within the ambit of "property" as defined by the Legislature. Noting that the language used in the statute was "broad" and sweeping,[12] we said, "It is clearly within the competence of the legislature to sweep within its taxable orbit all kinds of property and any and all kinds of interests therein." *Id.*, p 205. We also observed:

> Nor will it be forgotten, in any question of statutory tax interpretation, that taxing is a practical matter and that the taxing statutes must receive a practical construction. While they will not be extended by implication, . . . neither will the words thereof be so narrowly interpreted as to defeat the purposes of the act. [*Id.*]

In construing the meaning of language of Act 282, we are cognizant of the principle that, in the absence of contrary direction by the Legislature, words used in a statute are to be given their ordinary meaning. *Sanchick* v *State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955). ("Words will be given their usual and customary meanings, *save as otherwise defined* . . . ." [Emphasis added].)

In the course of considering whether the term property is "otherwise defined" in Act 282, we take note of its usual and customary meaning as reflected in Black's Law Dictionary. There,

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[11] 1899 PA 188, MCL 205.201 *et seq.*; MSA 7.561 *et seq.* The act was recently amended by 1993 PA 54.

[12] The inheritance tax act in effect at the time this Court decided *Brackett* defined property as follows:

> The word . . . "property" as used in this act . . . shall include *all property* or interest therein whether situated within or without this state and including all property represented or evidenced by note, certificate, stock, land, contract, mortgage or other kind or character of evidence thereof, and regardless of whether any such evidence of property is owned, kept or possessed within or without this state. [1948 CL 205.221; MSA 7.582. (Emphasis added.)]

the word "property" is defined as denoting "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal . . . ." 6th ed, p 1216. Another common definition of property is "[s]omething tangible or intangible to which its owner has legal title." The American Heritage Dictionary (2d college ed), p 993.

As earlier indicated, § 5 of Act 282 states that the term property "shall be deemed to *include all property*, real or personal" belonging to the business service companies subject to taxation under the act. Of course, the statutory definition of a term is controlling, but only to the extent that it provides instruction with regard to proper construction. We note that §5 gives guidance regarding what is to be *included* in the assessment—but only by referring to "property" repeatedly throughout the section without providing a separate definition of the word "property." Because "property" is not "*otherwise* defined" in § 5, we do not find it necessary to discard the usual and customary meaning of the word.

Moreover, as one authority has explained, where a term is defined by declaring what it "includes," it is susceptible to extension of meaning by construction. 2A Singer, Sutherland Statutory Construction (5th ed), § 47.07, pp 151-156. When used in a statutory definition, the word "includes" is a term of enlargement, not of limitation. It "conveys the conclusion that there are other items includable, though not specifically enumerated . . . ." *Id.*, p 152. Such a definition suggests, if not requires, a construction broad enough to encompass other items not explicitly mentioned.

As we read the language of § 5 of Act 282, we find that the Legislature left no doubt that it intended a broad construction of the word property. Its definition in the first sentence of that section includes no less than three separate references to *all* property:

> The term property . . . include[s] *all property*, real or personal . . . *and all other property* used in carrying on their business . . . *and all other real and personal property* . . . . [Emphasis added.]

Given that the usual and customary meaning of property includes intangibles, and noting that the Legislature deliberately chose not to use the limiting term "*tangible* personal property" (cf. Const 1963, art 9, § 3), we conclude that the Legislature intended intangible as well as tangible property to be covered by its § 5 definition of "property." We find that the Legislature's use of the words "all property" conveyed a meaning that is unambiguous and provides authority for inclusion of both tangible and intangible property in the valuation and assessment of property for purposes of taxation under Act 282.[13]

Our interpretation of the words "all property" is not only justified by the arrangement and use of language in Act 282, but we observe that it also comports with the "unit concept" of valuing utility property used by the Tax Tribunal in this case. This method of valuing utility property has been recognized by courts for more than one hundred years. In *Adams Express Co* v *Ohio State Auditor*, 165 US 194, 220, 17 S Ct 305; 41 L Ed 683 (1897), the United States Supreme Court stated:

> As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines extended, might be *valued as a unit* for purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State . . . . [Emphasis added.]

The appropriateness of the unit method of valuing utility property was first recognized by this Court at the turn of the century. *Detroit Citizen's Street-Railway Co* v *Detroit Common*

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[13] Our construction is reinforced by the reference in § 5 of Act 282 to a franchise as property. While providing that a franchise is not to be directly assessed, Act 282 explicitly requires that this intangible property interest is to "be taken into consideration in determining the value of the other property." See *Duluth, SS & A R Co* v *Corp & Securities Comm*, 353 Mich 636, 666; 92 NW2d 22 (1958).

Council, 125 Mich 673; 85 NW 96 [86 NW 809] (1901).[14] Moreover, it has long been established that the assessment of utility property as a unit requires consideration of intangibles. For example, in *Adams Express Co* v *Ohio State Auditor (After Rehearing)*, 166 US 185, 219; 17 S Ct 604; 41 L Ed 965 (1897), the United States Supreme Court stated:

> Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, *intangible* though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this *intangible* property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property? [Emphasis added.]

Intangible assets are included in the valuation on the basis of the theory that a total operating system is integrated through a "unity of use." See Amdur, *Property taxation of regulated industries*, 40 Tax Lawyer 339, 347 (1987). See also *Pullman Co* v *Richardson*, 261 US 330; 67 L Ed 682; 43 S Ct 366 (1923); *Detroit Citizen's Street-Railway* v *Detroit Common Council*, *supra*; *ITT World Communication* v *San Francisco*, 37 Cal 3d 859; 693 P2d 811 (1985); *Michigan Wisconsin Pipe Line Co* v *Iowa State Bd of Tax Review*, 368 NW2d 187 (Iowa, 1985).

Valuing the company's property as an integrated system (i.e. "unity of use") requires including intangible elements that affect the property's value. As one respected authority on Michigan law has explained:

> The value of the tangible property of a telephone company is not, alone, a proper valuation, nor is the cost price of a

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[14] In *Consumers Power Co* v *Port Sheldon Twp*, 91 Mich App 180; 283 NW2d 680 (1979), the Court of Appeals noted that in Michigan, the unit method is used to value properties that, by statute, require central assessment, such as telephone, telegraph, and rail companies.

> telegraph company, with deductions for deterioration. A requirement that telegraph lines shall be assessed at their cash value means valuation as a whole, plus the intangible value as a system. [2 Cooley, Taxation (4th ed), § 965, pp 1945-1946 (citations omitted).]

See also *Soo Line R Co* v *Michigan*, (Docket No. 2068-2069, December 5, 1977), wherein the Tax Tribunal opined:

> The unitary valuation approach allows a determination of the true cash value of a particular segment of an interstate business by valuation of the entire system with subsequent value allocation to the taxing jurisdiction by a percentage factor representative of the value of the portion of the total system attributable to the taxing jurisdiction. [*Id.*, pp 2-3.]

It is noteworthy that use of the unit concept in valuing utility property does not always or necessarily result in an increase in the assessment. The effect of appraising the property as a unit—including intangibles—can either enhance or diminish the value of the tangible property.[15]

In assessing the operating real and personal property of petitioner located in Michigan,[16] as required by Act 282, the Tax Tribunal employed the unit method of valuation and determined that "intangibles were properly included as adding value to that property." *Id.*, p 13. We conclude that in doing so the tribunal did not err.

IV

Next, we turn to petitioner's contention that the state is precluded by the intangibles tax act, 1939 PA 301, MCL 205.131 *et seq.*; *MSA* 7.556(1) *et seq.*, from including intangibles in the valuation of its property under Act 282.

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[15] See Bertane, *The assessment of public utility property in California*, 20 UCLA L R 419 (1973).

[16] Because all of the operating property of MBTC was located in Michigan during the tax years in question, this case involved no issue of apportionment of value between states.

Petitioner points to § 3(10) of the intangibles tax act, which expressly exempts from taxation under that act the intangible personal property of telephone companies and other businesses "paying the tax assessed and levied under Act No. 282 . . . ." Petitioner then calls attention to § 2(e) of the intangibles tax act, which in pertinent part provides:

> Intangible personal property subject to tax under this act *or expressly exempt from the tax hereunder* shall be exempt from all *general* property taxes under the laws of this state. [Emphasis added.]

Upon the basis of the wording of §§ 2(e) and 3(10) of the intangibles tax act, petitioner advances the circular reasoning that because it is "paying the tax assessed and levied under Act No. 282," its intangible personal property is exempt from taxation under § 3(10) of the intangibles tax act, and because it is "expressly exempt," the same intangible property is also rendered exempt by § 2(e) from taxation under Act 282.

We reject this reasoning for two reasons. First, we believe it is clear that the Legislature provided the § 3(10) exemption for telephone and other public service companies precisely because their intangible property is subject to taxation under Act 282. The obvious and reasonable purpose was to avoid double taxation of such assets.

Second, the petitioner's position has no validity unless the Act 282 tax is a "general" property tax. We are persuaded by respondents' argument that the tax assessed under Act 282, unlike the General Property Tax Act, is more appropriately characterized as a selective tax imposed upon a relatively small number of companies whose property is centrally assessed, and whose businesses are public service in nature. Having in mind that the Legislature referred specifically to Act 282 when it granted the exemption in § 3(10) of the intangibles tax act, we are not convinced that it intended, through the use of general terms in another section of the same act, to turn around and exempt the same intangibles of the same public service companies from any and all taxation under Act 282.

We conclude that the intangibles tax act does not preclude consideration of intangibles in valuing and assessing property for purposes of taxation under Act 282.

V

Finally, we consider petitioner's contention that in light of Const 1963, art 9, § 5, taxation of its intangible personal property is unconstitutional.

This provision of the constitution specifically refers to those public service businesses that were taxed under Act 282 before the current constitution became effective. It directs the Legislature to

> provide for the assessment by the state of the *property* of those public service businesses assessed by the state at the date this constitution becomes effective, and of other property as designated by the legislature, and for the imposition and collection of taxes thereon. [Emphasis added.][17]

It will be noted that this language recognizes no distinction between tangible and intangible property. Further, a convention comment that accompanied § 5 suggests that the word "property" was chosen for reasons rooted in the history of earlier constitutions of this state. The comment states:

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[17] Following is the full text of Const 1963, art 9, § 5:

> The legislature shall provide for the assessment by the state of the property of those public service businesses assessed by the state at the date this constitution becomes effective, and of other property as designated by the legislature, and for the imposition and collection of taxes thereon. Property assessed by the state shall be assessed at the same proportion of its true cash value as the legislature shall specify for property subject to general ad valorem taxation. The rate of taxation on such property shall be the average rate levied upon other property in this state under the general ad valorem tax law, or, if the legislature provides, the rate of tax applicable to the property of each business enterprise assessed by the state shall be the average rate of ad valorem taxation levied upon other property in all counties in which any of such property is situated.

> This is a new section directing the legislature to continue the present system of state assessment and collection of property taxes on the properties of certain utilities (notably telephone companies and railroads) . . . .

In the light of these guideposts, it is instructive to examine and compare pertinent language in § 3 of the same art 9 of the current constitution. It relates to the subject of general ad valorem taxation of property:

> The legislature shall provide for the uniform general ad valorem taxation of real and *tangible* personal property not exempt by law. [Emphasis added.][18]

Clearly, § 3 *does* distinguish between tangible and intangible property, and it limits the application of the general ad valorem property tax to real and *tangible* personal property. We are urged by petitioner to construe the meaning of "property" in § 5 by reading it as though it were modified by the word "tangible," as in § 3. We reject this suggestion.

When construing a constitution, words are to be given their natural and ordinary meaning. *People* v. *Nash*, 418 Mich 196; 341 NW2d 439 (1983). "The object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it." 1 Cooley, Constitutional Limitations (8th ed), p 124. "Often, however, '[w]e cannot understand these provisions unless

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[18] Following is the full text of Const 1963, art 9, § 3:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates.

we understand their history. . . .'" *Booth Newspapers, Inc* v *U of M Bd of Regents*, 444 Mich 211, 253; 507 NW2d 422 (1993) (Riley, J., dissenting), quoting Cooley, *supra*, p 132.

A review of some of the history of the 1850 and 1908 constitutions throws light on the meaning of words now at issue. In 1900, Governor Pingree proposed and successfully pushed to ratification an amendment to the 1850 Constitution. Appearing before a joint session of the houses of the Legislature, he explained the need for such an amendment:

> Under our Constitution, as construed by the Supreme Court of Michigan, it is practically impossible to frame a law by which property of railroad, telegraph, telephone and express companies can be taxed upon its true value . . . .[Journal of the House, October 10, 1900, p 10.]

He continued at length, arguing the advantages of taxing the property of these companies, rather than their earnings. He contended that such a change in the method of taxing such companies would greatly benefit the school system.

Pointing to railroads as an example, Governor Pingree asserted, "Without franchises to operate their roads in Michigan, they would not enjoy the profits from 'through traffic.'" *Id.*, p 12. Acknowledging concern expressed that "no valuation has been made of railroad, telegraph, telephone and express companies' property," he explained that it would be the duty of the Board of State Tax Commissioners to "ascertain the valuation of the property of [these] corporations . . . ." *Id.*, p 13.

Leaving no doubt that his concept of property included intangibles, the Governor noted that the board had employed Prof. Henry C. Adams of the University of Michigan

> to investigate the subject of franchise values, and to determine the value of immaterial or intangible property, including the franchises, of these corporations. The addition of the value of the tangible property to the value of the intangible property, including franchises, will give the total valuation according to one method of appraising the property. [*Id.*, p 13.]

He concluded this portion of his address to the Legislature as follows:

> Many of the statements herein made with reference to railroad, apply with equal force to telegraph, telephone and express companies, which pay taxes upon their earnings. In the case of the latter corporations, it will be found that the properties of greatest value which they possess are their franchises. [*Id.*, p 15.]

Although, as adopted, the amendment of the 1850 Constitution (art 14, § 10) mentioned only corporations to be designated by the Legislature,[19] it laid the foundation for the fundamental change in Michigan taxation of public service businesses, such as railroads, telegraph and telephone companies, which occurred with enactment in 1905 of Act 282. Later, when the 1908 Constitution was ratified, art 10, § 5 specifically referred to public service companies, including those that transmitted "messages by telephone or telegraph."[20]

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[19] Const 1850, art 14, § 10 provided:

> The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value by a state board of assessors and for the levying and collection of taxes thereon.

[20] Const 1908, art 10, § 5 provided:

> The legislature may provide by law for the assessment at its true cash value by a state board of assessors, of which the governor shall be ex-officio a member, of the property of corporations and the property, by whomsoever owned, operated or conducted, engaged in the business of transporting passengers and freight . . . transmitting messages by telephone or telegraph . . . and for the levy and collection of taxes thereon.

In light of this background, we find it particularly significant that neither the 1850 nor the 1908 Constitutions reflected any intention to distinguish between tangible and intangible property. Indeed, history strongly suggests that the word "property" was understood to include intangible, as well as tangible property.

Not until 1939, when the intangibles tax act was enacted, did intangibles become exempt from taxation under the General Property Tax Act and subject to separate taxation.[21] Thus, when the 1963 Constitution was drafted and ratified, art 9, § 3 relating to the general ad valorem property tax, recognized in the constitution for the first time a distinction between tangible and intangible property. Application of the general property tax was limited to "real and *tangible* personal property."

However, similar language was not used by the drafters of Const 1963, art 9, § 5, which refers to Act 282 taxation. Because intangibles of the affected public service companies are not, and never have been, exempt from Act 282 taxation, art 9, § 5 of the current constitution, like its counterpart in the 1908 Constitution, provides for "assessment by the state of the *property*" of certain public service companies.

Obviously, if they had so intended, the framers of the 1963 Constitution could have altered the treatment historically accorded public service companies taxed under Act 282. They could have done so by inserting the modifier "intangible" in art 9, § 5, just as they did in art 9, § 3. That they chose not to do so persuades us that Const 1963, art 9, § 5 is not a bar to the inclusion of intangibles in the assessment of property under Act 282.[22]

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[21] MCL 205.132(e); MSA 7.556(2)(e).

[22] Petitioner sought in this appeal to argue also that Act 282 violates equal protection guarantees in the federal and state constitutions. However, because this issue clearly falls outside the limits of our order granting leave to appeal, we do not address it.

VI

For the reasons set forth, we affirm the decisions of the Michigan Tax Tribunal and the Court of Appeals.

[Signatures]

APPENDIX B

MICHIGAN SUPREME COURT

Rehearing No. 311

MICHIGAN BELL TELEPHONE COMPANY,
Petitioner-Appellant,
v
DEPARTMENT OF TREASURY,
Respondent-Appellee.

SC 95347-49
CoA 127402, 131780, 133117
LC MTT 90553

Entered: August 2, 1994

ORDER

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

APPENDIX C

STATE OF MICHIGAN COURT OF APPEALS

Nos. 127402; 131780

MICHIGAN BELL TELEPHONE COMPANY,
Petitioner-Appellant,
v
DEPARTMENT OF TREASURY,
Respondent-Appellee.

MICHIGAN BELL TELEPHONE COMPANY,
Petitioner-Appellant/
Cross-Appellee,
v
DEPARTMENT OF TREASURY and
STATE BOARD OF ASSESSORS,
Respondents-Appellees/
Cross-Appellants.

No. 133117

Dated: November 6, 1992

Before: Hood, P.J., and Wahls and McDonald, JJ.

MEMORANDUM.

Petitioner appeals as of right the March 13, 1990 opinion and judgment, with errata filed March 23, 1990, and the September 21, 1990 final order of the Michigan Tax Tribunal establishing the true cash value of its property for the years of 1984, 1985 and 1986 and the average tax rate by which such property is to be

taxed. Respondents cross-appeal several aspects of those same orders.

After a thorough review of the matter, including all the issues raised in the appeal and cross-appeal, we find no error requiring reversal or remand. We are in total agreement with the findings and conclusions of the Tribunal and adopt its opinion as our own. We add only that we reject respondent's argument on cross-appeal that the tribunal erred in requiring that interest be paid on any overpayment of taxes. The tribunal correctly ordered that any refund to petitioner for the overpayment of taxes must include interest. MCL 205.737(4); MSA 7.650(37)(4).

Affirmed.

/s/ Harold Hood
/s/ Myron H. Wahls
/s/ Gary R. McDonald

APPENDIX C

STATUTORY PROVISIONS

Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b):

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

* * *

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

Michigan Act 282, Mich. Comp. Laws Ann. § 207.4:

It shall be the duty of said board to make an annual assessment upon an assessment roll, to be prepared by said board, of the property, by whomsoever owned, operated or conducted, and having a situs in this state as hereinafter defined, of railroad companies, union station and depot companies, telegraph companies, telephone companies, sleeping car companies, express companies, car loaning companies, stock car companies, refrigerator car companies and fast freight line companies, and all other companies owning, leasing, running or operating any freight, stock, refrigerator, or any other cars not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this state * * *.

Michigan Intangibles Tax Act, Mich. Comp. Laws Ann. § 205.132(e):

> Intangible personal property subject to tax under this act or expressly exempt from the tax hereunder shall be exempt from all general property taxes under the laws of this state.

Supreme Court, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

(2)

No. 94-570
In the Supreme Court of the United States
October Term, 1994

MICHIGAN BELL TELEPHONE COMPANY,
Petitioner,

v

DEPARTMENT OF TREASURY AND
STATE BOARD OF ASSESSORS,
Respondents.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

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QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION CLAUSE REQUIRES THAT STATE-ASSESSED TELEPHONE COMPANIES BE GIVEN THE SAME PROPERTY TAX TREATMENT THAT STATE-ASSESSED RAILROADS ARE GIVEN CONSIDERING THE LIMITATIONS IMPOSED UPON THE STATE TAXATION OF RAILROADS PURSUANT TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT, 49 U.S.C. 11503.

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Constitution

Michigan Constitution

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STATEMENT OF THE CASE

Pursuant to article 9, § 3 of the Michigan constitution, the Michigan legislature has provided for the uniform general ad valorem taxation of designated real and tangible personal property. This section of the Michigan constitution also provides that "[E]very tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." (See Pet. App. 14a) The ad valorem property taxation of telephone companies and other designated public service companies, which includes railroads, is governed by article 9, § 5 of the Michigan constitution and is imposed pursuant to 1905 P.A. 282, Mich. Comp. Laws Ann. § 207.1 et. seq. (Act 282). As indicated by the Michigan Supreme Court in its opinion in this case, the

tax imposed by Act 282 is not a "general" ad valorem property tax which, under Michigan law, would require the same taxing treatment to all to whom it applies. Rather, the tax imposed under Act 282 is a tax "other than the general ad valorem property tax" (See Pet. App. 12a) which Michigan and federal law would require to be uniform or equal as to that class or classes upon which it operates. Contrary to the assertions of Petitioner, Act 282 does not indicate that telephone companies and railroad companies are in the same "class", so as to require identical treatment for state taxation purposes.

The basic facts in this case are stated in the opinions of the Michigan Supreme Court and the Michigan Tax

Tribunal. Summarized, the basic facts of the case are as follows:

In 1984, Petitioner filed its petition appealing its 1984 assessment under Act 282 to the Michigan Tax Tribunal. The petition was later amended to include the 1985 and 1986 tax years. The petition made no reference to any constitutional violation, either state or federal, in the assessments established by Respondents.

During the months of August and September of 1987, the Michigan Tax Tribunal heard 20 days of testimony. There was no evidence presented at the Tax Tribunal that assessments under Act 282 for railroads were computed any differently than were assessments for telephone companies. In fact, the only

testimony on this subject was that assessments for railroad companies were computed the same as were assessments for telephone companies.

Subsequent to the close of proofs, the parties filed their respective briefs and replies. Petitioner's briefs did not indicate that the assessments at issue were being assailed because of a perceived unequal treatment between railroad companies and telephone companies. Petitioner did indicate, in four short paragraphs of its 117-page Trial Brief Relating to Valuation, that it felt the inclusion of intangibles in its assessments, while intangibles were excluded from the assessments of entities subject to Michigan's General Property Tax, violated both the state and federal constitutions.

While it is admitted that the Tax Tribunal is a "quasi-judicial agency" of limited jurisdiction, Petitioner's assertion at page 4 of its Petition For Writ of Certiorari that the Tax Tribunal lacks the power to determine constitutional issues is simply wrong. As indicated in the case of Wikman v. Novi, 413 Mich. 617, 646-647; 322 N.W.2d 103, 114 (1982), the Tax Tribunal lacks the authority to declare a statute unconstitutional. The Tax Tribunal does however have the authority to evaluate claims couched in constitutional terms to determine the validity of matters within its jurisdiction. Town and Country Dodge, Inc. v. Michigan Department of Treasury, 118 Mich. App. 778; 325 N.W.2d 577 (1982), Johnston v. City of Livonia, 177 Mich. App. 200; 441 N.W.2d 41 (1989).

On March 13, 1990, the Tax Tribunal issued its Opinion and Judgment as to the valuation aspect of the case. On March 23, 1990, an Errata to its earlier Opinion and Judgment was entered by the Tax Tribunal. Neither the initial Opinion and Judgment nor the Errata made any mention of Petitioner's constitutional argument. The Tax Tribunal noted on page 3 of its March 23, 1990 Opinion and Judgment that only those issues of "decisional significance" were discussed.

Petitioner subsequently filed a Claim of Appeal with the Michigan Court of Appeals. In its initial brief to the Court of Appeals, Petitioner again indicated that it felt the ruling of the Tax Tribunal requiring the inclusion of

intangibles in its assessments, while taxpayers subject to Michigan's General Property Tax did not have their intangibles included, violated the Michigan and federal constitutions. It was not until October 31, 1991 when Petitioner requested permission from the Michigan Court of Appeals to file a supplemental brief that Petitioner articulated the equal protection argument that it now presents to this Court; that being that the inclusion of intangibles in the tax base of Petitioner, when supposedly intangibles are not to be included in the tax base of Railroads pursuant to the 4-R Act, somehow violates the Equal Protection Clause of the U.S. Constitution. On November 6, 1992, the Michigan Court of Appeals issued its memorandum opinion affirming the determination of

the Michigan Tax Tribunal. Petitioner's constitutional arguments raised in its supplemental brief were not discussed.

Subsequent to the issuance of the memorandum opinion of the Michigan Court of Appeals, Petitioner sought leave to appeal to the Michigan Supreme Court. One of the issues upon which Petitioner sought leave was its contention that the inclusion of intangibles in its tax base, when supposedly intangibles are not to be included in the tax base of railroads under the 4-R Act, infra, was constitutionally impermissible. While the Michigan Supreme Court did grant Petitioner's Application For Leave To Appeal, the appeal was limited to the sole issue of whether, under Michigan law, intangibles were to be included in Petitioner's tax base under Act 282.

On June 21, 1994, the Michigan Supreme Court issued its opinion in this case, holding that the inclusion of intangibles in the tax base of Petitioner was required by Michigan law. The Michigan Supreme Court did not address Petitioner's equal protection challenges. On August 2, 1994, the Michigan Supreme Court denied Petitioner's Motion For Rehearing.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF EQUAL PROTECTION BETWEEN TAXPAYERS SUBJECT TO TAXATION UNDER ACT 282 WAS NOT RAISED IN THE TRIAL FORUM, OR CONSIDERED OR DECIDED BY AN APPELLATE COURT AND THUS CAN PRESENT NO CONFLICT OF DECISIONS FOR THIS COURT TO REVIEW.

Petitioner argues that it is a denial of equal protection to subject its intangibles to tax when supposedly the intangibles of railroads are not subject to tax. Petitioner's equal protection argument at the Tax Tribunal was limited to the question of whether it was a violation of equal protection to treat taxpayers differently under Act 282 than they would be treated if they were to be taxed under Michigan's General Property Tax Act and was not raised by Petitioner until after the trial of the cause.

The question as to whether it would be a violation of equal protection to treat taxpayers who were both subject to Act 282 in a different manner, was not raised as a legal issue until Petitioner filed its Motion For Leave To File a Supplemental Brief in the Michigan Court of Appeals. The Michigan Court of Appeals, in its decision in this case, did not discuss Petitioner's equal protection argument at all. Likewise, the Michigan Supreme Court did not accept Petitioner's equal protection issue as an issue to be decided on appeal. The only constitutional issues discussed by the Tax Tribunal or Michigan appellate courts below were issues of Michigan constitutional law dealing with the inclusions of intangibles in the tax base of Petitioner. There was no dis-

cussion of violations of the United States Constitution. Simply put, the federal question Petitioner is now asking this Court to review was neither properly raised nor decided in any of the lower courts, which is a prerequisite to this Court considering the issue. Godchaux Co. v. Estopinal, 251 U.S. 179; 48 S. Ct. 116; 73 L. Ed. 213 (1919), Beck v. Washington, 369 U.S. 541; 82 S. Ct. 995; 8 L. Ed. 2d 98 (1962). In Michigan, legal issues must be raised at the trial forum. If they are raised for the first time on appeal, which was the case here, the appellate court generally refuses to consider the issue. Allied Building Credits, Inc. v. Mathewson, 335 Mich. 270, 275; 55 N.W.2d 826, 828 (1952).

Additionally, in order for this Court to have the jurisdiction to consider the issue presented by Petitioner, it is clear that the decision of the courts below must be based upon federal grounds. If the decisions below are based solely upon independent and adequate state grounds, this Court lacks the jurisdiction to hear the matter. Hub v. Pitcairn, 324 U.S. 117; 65 S. Ct. 459; 89 L. Ed. 789 (1945).

Because of the above, no substantial federal question is presented in this case and this Court lacks the requisite jurisdiction to hear this case under 28 U.S.C. § 1257.

II.

PETITIONER HAS NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAWS NOR BEEN TREATED IN A MANNER NON-UNIFORM WITH THAT OF OTHER TAXPAYERS IN ITS CLASS.

Petitioner contends that the equal protection guarantee of the United States constitution prohibits the inclusion of intangibles in its tax base under Act 282. Petitioner's argument in this regard is based upon the assumption that the tax levied on Petitioner under Act 282 must be precisely the same as the tax levied against all other taxpayers subject to Act 282. This is not the law in Michigan or under the United States constitution.

It is a well settled rule, in both federal and Michigan law, that different taxing treatment of different classes of

taxpayers is not a violation of the equal protection provision of the federal or Michigan constitutions. W S Butterfield Theater, Inc. v. Dep't. of Revenue, 353 Mich. 345; 91 N.W.2d 269 (1958); Lawrence Baking Co. v. Michigan Unemployment Compensation Commission, 308 Mich. 198; 13 N.W.2d 269 (1944); Bell's Gap R Co. v. Pennsylvania, 134 U.S. 232; 10 S. Ct. 533; 33 L. Ed. 892 (1890); Southwestern Oil Co. v. Texas, 217 U.S. 114; 30 S. Ct. 496; 54 L. Ed. 688 (1910). The only condition is that the differentiation between the classes be reasonable, or that any state of facts reasonably can be conceived to sustain it. Lawrence Baking Co. v. Michigan Unemployment Compensation Commission, supra, Tomlinson v. Tomlinson, 338 Mich. 274; 61 N.W.2d 102

(1953); American Sugar Refining Co. v. Louisiana, 179 U.S. 89; 21 S. Ct. 53; 45 L. Ed. 102 (1900). Additionally, in order for Petitioner to prevail on its claim it must negate every conceivable basis which might support the legislatively determined classes. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364; 93 S. Ct. 1001; 35 L. Ed. 2d 351 (1973), W S Butterfield Theater, Inc. v. Dep't. of Revenue, supra, and American Amusement Co. v. Department of Treasury, 91 Mich. App. 573; 282 N.W.2d 803 (1979) app. dis. 446 U.S. 931; 100 S. Ct. 2145; 64 L. Ed. 2d 783.

In the instant case, there has been no evidence presented, nor could there be, that Petitioner is treated any dif-

ferently than any other taxpayer in its class--that being telephone companies subject to tax under Act 282. Equal protection requires no more.

III.

THE MICHIGAN LEGISLATURE AND THE UNITED STATES CONGRESS MAY CONSTITUTIONALLY AFFORD DIFFERENT TAXING TREATMENT TO DIFFERENTLY SITUATED TAXPAYERS.

As noted earlier it is not a denial of equal protection to treat differently situated taxpayers in a different manner. There is no question under either Michigan or federal law that taxpayers subject to tax under Michigan's General Property Tax Act may be treated differently than those taxed under Act 282. Likewise, there may be disparate tax treatment afforded taxpayers who are subject to the same tax, other than

Michigan's General Property Tax, again--as long as the distinctions drawn between the taxpayers are reasonable.

For example, in Act 282, railroads are afforded a credit against their tax equal to 25% of the amount expended for the maintenance or improvement of rights of way. 1905 P.A. 282, § 13. Mich. Comp. Laws Ann. § 207.13. This credit, in effect, relieves almost all railroads in Michigan from paying <u>any</u> tax under Act 282. No other taxpayer under Act 282 has the benefit of such a credit, yet this does not result in a denial of equal protection. It is an example of the Michigan Legislature deciding that railroads should be afforded tax treatment different from other taxpayers under Act 282. As there are reasonable

distinctions between railroads and other taxpayers under Act 282, this disparate tax treatment does not violate equal protection guarantees.

Likewise, the federal government has decided that there was a possibility that railroads were being discriminated against in the manner in which they were being subjected to the various state property taxes. The United States Congress reacted to this perceived discrimination by passing the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 (the 4-R Act) which allows railroads, the opportunity to contest their state property taxes in federal court. The United States Congress has not seen fit to afford tele-

phone companies the same opportunity.[1]

If a railroad doing business in Michigan feels that its tax burden under Act 282 is discriminatory, it may, under the 4-R Act, appeal such tax to federal court.[2]

This opportunity simply supports the premise that differently situated taxpayers, subject to tax under Act 282, may be treated differently with no equal protection violation. If a railroad has a cause of action under the 4-R Act, that does not mean that another taxpayer under Act 282, not subject to the 4-R Act, can follow along.

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[1]There have been proposed legislative changes that would have included telephone companies within the 4-R Act. None of these proposals have passed.

[2]To date there have been no such appeals by railroads in Michigan.

The tests applied to one assailing the constitutionality of a state statute on equal protection grounds under either state or federal constitutions is stringent. As this Court stated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78; 31 S. Ct. 337; 55 L. Ed. 369 (1911):

> The rules by which this contention [equal protection violation] must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the

> law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

The Petitioner has in no wise met the test. The state and federal constitutions do no more than require that those who are members of the same class be treated uniformly, for tax purposes or otherwise. Quite simply, railroad companies and telephone companies may, for tax purposes, be treated as belonging to different classes. No constitutional proscription is violated by doing so.

Differently situated taxpayers may be treated differently. Taxpayers subject to tax under Michigan's General Property Tax Act may be treated differ-

ently than those taxed under Act 282. Differently situated taxpayers subject to tax under Act 282 may be afforded different tax treatment. Railroads could be treated differently from telephone companies, and both could be treated differently than, for example, car leasing companies. As long as the legislatively created distinctions are reasonable, there is no denial of equal protection. In the instant case Petitioner is treated the same as all other telephone companies doing business in Michigan and subject to tax under Act 282.

IV.

THE DECISION OF THE MICHIGAN SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Petitioner argues that the holding of the court below conflicts with the

decision of the Nebraska Supreme Court in Northern Natural Gas Co. v. State Board of Equalization & Assessment, 232 Neb. 806; 443 N.W.2d 249, cert. den. 493 U.S. 1078 (1990). While it is true that the Nebraska Supreme Court required pipeline property to be equalized with railroad property, this case stands alone in the premise that the tax treatment afforded railroads under the 4-R Act must be extended to other entities subjected to like taxes. The Supreme Courts in other states where this issue has been addressed have ruled that equal protection guarantees do not require that the favorable tax treatment afforded railroads under the 4-R Act be extended to other taxpayers paying the same tax.

For example, in Federal Express Corp. v. Tennessee State Board of Equalization, 717 S.W.2d 873 (Tenn. 1986), the Tennessee Supreme Court considered a taxpayer's challenge to the assessment of its property at the 55% rate applicable to public utility property rather than the 30% rate applicable to commercial and industrial property. In rejecting the contention that the federal equal protection clause precluded the state from assessing the taxpayer's property at the rate applicable to utility property while assessing railroad property at the lower rate applicable to commercial and industrial property, the court reasoned that the 4-R Act preempted the state's classification of railroads and provided that they should be taxed as other commercial

and industrial property is taxed, leaving in effect the state's tax treatment of other public utilities.

In Alabama v. Colonial Pipeline Co., 471 So.2d 408 (Ala. Civ. App. 1984), app. den. 474 U.S. 936 (1985), the Alabama Court of Civil Appeals considered a pipeline's challenge to the assessment of its property at the highest applicable rate that was prescribed for public utility property. The property of railroads had been assessed at a lower rate than the rate applicable to the pipeline's property because of the requirements of the 4-R Act. In its opinion rejecting the pipeline's objection to its assessment at the public utility rate, the court dismissed the suggestion that disparate treatment of

pipelines, on the one hand, and railroads, on the other, would violate the federal equal protection guarantee even though the property of the pipelines and railroads was included within the same property tax classification category under state law. The court, citing the supremacy of federal law, found that the 4-R Act preempted the state classification system as applied to railroads but left it in place as applied to pipelines.

Federal Express and Colonial Pipeline hold that the 4-R Act has created a classification scheme that is binding on the states. So long as that classification scheme has a rational basis (the revitalization of the railway system, Oregon Revenue Dep't. v. ACF

Industries, Inc., 510 U.S. ___, ___; 114 S. Ct. 843; 127 L. Ed. 2d 165 (1994)), no substantial equal protection attack can be levied against the classification. And this is so, regardless of how the states might have originally classified the property in question.

In the case of Kennecott Corp. v. Utah State Tax Commission, 858 P.2d 1381 (Utah 1993), the Utah Supreme Court rejected the argument that state-assessed taxpayers are entitled to the same tax treatment under the equal protection clause as accorded to "similarly situated" state-assessed railroads covered under the 4-R Act (the same argument made by Petitioner). The court stated that to establish an equal protection violation, a party must demon-

strate that the law creates a certain class of persons who are similarly situated and must show that the law is applied differently to members of the class without a reasonably related legitimate government purpose. The court found that the 4-R Act was a distinguishing factor in determining that the railroads and Kennecott were not similarly situated. See also ANR Pipeline Co. v. Director of Property Valuation, 254 Kan. 534; 866 P.2d 1060 (Kan. 1994), cert. den. October 3, 1994, 1994 U.S. Lexis 6979.

CONCLUSION

In this case, the forums below decided no important questions of federal law which in any way conflict with applicable decisions of this Court. Nor was a federal question decided in a way that conflicts with the decision of another court of last resort. In fact, neither the Michigan Tax Tribunal, nor the Michigan Court of Appeals nor the Michigan Supreme Court addressed a federal question at all. Nor did the forums below address Petitioner's equal protection argument presented in the instant petition. Notwithstanding this, it is clear that the taxing treatment afforded Petitioner by the State of Michigan under Act 282 does not impinge upon Petitioner's federal guarantees of equal protection of the laws.

RELIEF SOUGHT

For these reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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October, 1994